Supreme Court, U.S.
FILED

No. 02-1285 FEB 20 2003

In The . . .

Supreme Court of the United States

JOHN FRANCIS HAYES,

Petitioner,

v.

MICHAEL YORK, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURT'S OPINION DEMONSTRATES THE NEED FOR THIS COURT TO ANALYZE NORTH CAROLINA'S INTERPRETATION OF THE STATE OF MIND EXCEPTION WHEN NORTH CAROLINA'S STATE OF MIND EXCEPTION ENCOMPASSES DECLARATIONS THAT DO NOT FIT WITHIN THE FIRMLY ROOTED HEARSAY EXCEPTION RECOGNIZED BY THE SUPREME COURT.

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CITATION TO PREVIOUS OPINIONS

The previous opinion is attached hereto as Appendix A and can be found at Hayes v. York, 311 F.3d 321 (4th Cir. 2002). It is a published opinion. The District Court's Opinion is attached at Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's judgment was entered on November 22, 2002. The question of whether, Petitioner was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel failed to make contemporaneous objections to certain hearsay evidence was presented to the Fourth Circuit and decided on the merits. This Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that, "No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

North Carolina Rule of Evidence 803 states the following:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression.--A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited Utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> (3) Then Existing Mental, Emotional, or Physical Condition.--A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the

fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

North Carolina Rule of Evidence Rule 804 applying to Hearsay when the Declarant is unavailable states as follows:

(a) Definition of unavailability.– "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar

motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death.--A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History.--(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions.--A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for

> which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

STATEMENT OF THE CASE

In 1996, the petitioner was convicted in state court for the second-degree murder of his wife. At trial, the State offered evidence that Hayes and his wife, Mrs. Hayes, had a turbulent, unfaithful, and abusive relationship, which ended with a 1994 altercation that resulted in Mrs. Hayes Death. The Petitioner claimed he killed his wife in self-defense, as she attacked him with a hammer and a baseball bat. Hayes v. York, 311 F.3d 321, 323 (4th Cir. 2002).

To rebut this claim, the state offered hearsay testimony of statements that Mrs. Hayes allegedly made to her friends and boyfriends including factual assertions that the Petitioner had abused her and threatened to kill her. Hayes, 311 at 323.

Examples of the hearsay statements are as follow:

> "[Mrs. Hayes] came in and it was apparent to me that she was upset... I asked her what was wrong. She said that she and John had been into it again. She wanted to know if I was going to tell her how stupid and dumb she was for putting up with it and not leaving. I told her "no" I wasn't going to tell her anything like that. She said John told her that if she ever left him he would kill her, and he would see her dead before she ever had any of his money"; "[Mrs. Hayes] came in and sat down, and her eyes were all swollen from crying. And I asked her what was wrong. And she said, "I almost didn't come tonight." I asked her why. She said John was in one of his rages again. And I asked her what happened. Again she said he got angry with her and unzipped his pants and urinated on the kitchen floor in front of her and then pushed her down and put her head down in it and wiped up the floor with her hair." Hayes, 311 at 323 (FN1).

Prior to trial, Hayes objected to the admission of these statements in a motion in limine. The statements were admitted . However, at trial, Hayes counsel failed to renew their objection. Hayes, 311 at 323.

On appeal, the Petitioner challenged the admission of these statements. The North Carolina Supreme Court granted review but held the merits of Mr. Hayes appeal could not be reviewed because "a motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to object to that evidence at the time it is offered for trial," State v. Hayes, 350 N.C. 79, 80, 511 S.E.2d 302 (1999).

The Petitioner then filed a Motion for Appropriate relief challenging his trial counsel's ineffectiveness for failing to preserve this issue. The court found that counsel's performance for failure to preserve the issue was deficient but his claim ultimately failed because the statements were admissible under N.C.R.E. 803(3) and 804(b)(5). State Certiorari was denied. Hayes, 311 at 324.

Petitioner filed a federal habeas action claiming ineffective assistance of counsel. The district court denied relief but granted a Certificate of Appealability. Hayes, 311 at 324. The Fourth Circuit Court of Appeals affirmed the district court holding that Mr. Hayes claim was not cognizable on federal habeas review as North Carolina's interpretation of the hearsay rule was not an unreasonable interpretation of federal law. Hayes, 311 at 326.

REASONS THE WRIT SHOULD ISSUE

In defining what was not a state of mind exception to the hearsay rule, Justice Carodozo reasoned, the testimony in question "faced backward and not forward... it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury." Shepard v. United States, 290 U.S. 96, 106 (1933).

The Fourth Circuit's finding that North Carolina's interpretation of the state of mind exception is not in direct conflict with this well settled principle of constitutional jurisprudence is in error. The constitutional questions presented to this court are important as North Carolina impermissibly limits defendant's right to confront their accusers as defined by this court.

I. THE COURT'S OPINION DEMONSTRATES THE NEED FOR THIS COURT TO ANALYZE NORTH CAROLINA'S INTERPRETATION OF THE STATE OF MIND EXCEPTION WHEN NORTH CAROLINA'S STATE OF MIND EXCEPTION ENCOMPASSES DECLARATIONS THAT DO NOT FIT WITHIN THE FIRMLY ROOTED HEARSAY EXCEPTION RECOGNIZED BY THE SUPREME COURT.

The defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment because trial counsel failed to make contemporaneous objections to certain hearsay evidence offered by the State at trial. The State of North Carolina's basis for denying this issue is contrary to clearly established federal law.

> "The testimony now questioned faced backward and not forward. This is at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more that that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury."
>
> Shepard v. United States, 290 U.S. 96, 105 (1933)

States must fashion rules of evidence which do not conflict with the fundamental precepts of liberty embodied in the United States Constitution. In the context of hearsay declarations, the Supreme Court has repeatedly held that to satisfy the Confrontation Clause, evidence must be reliable and that reliability is established when the evidence admission comports with a traditionally accepted exception to the hearsay rule or when the evidence possesses independent guarantees of trustworthiness. See Ohio v. Roberts, 448 U.S. 56 (1980); White v. Illinois, 502 U.S. 346 (1992); and Idaho v. Wright, 497 U.S. 805 (1990). And the confrontation clause . . . "bars the admission of some evidence that would otherwise be admissible under . . . the hearsay rule." Idaho v. Wright, supra at 814. Thus the question of admissibility under the confrontation clause is a federal question cognizable in *habeas corpus* proceedings when state courts do not adequately address constitutional admissibility as is the case here.

Like its identically worded federal counterpart, Rule 803(3) of the North Carolina Rules of Evidence permits the introduction of out-of-court statements which contain a present declaration of the state of mind of the declarant. As such, this exception is the firmly-rooted exception involving state of mind. Shepard v. United States, 290 U.S. 96, 105

(1933). If evidence fits this traditional exception it satisfies the Confrontation Clause. If the evidence does not comport with the requirements of Rule 803(3), it can only be admitted if it possesses independent guarantees of trustworthiness.

The rule against admitting hearsay is grounded in the concept that only reliable evidence should be presented to the trier of fact. White v. Illinois, 502 U.S. 346, 356-357 (1992) (citation omitted). Reliability normally is established by allowing the opponent to test the veracity of the witness by cross-examination. Idaho v. Wright, supra at 819, quoting J. Wigmore, page 251. However, when hearsay is offered, the speaker is usually not present, so the evidence is admissible only when a substitute for cross-examination is available. Supra at 820. Thus, exceptions to the hearsay exclusion have traditionally developed when because of their own indices of reliability, a meaningful substitute for cross-examination is provided. Id. These exceptions include entries in the family bible, statements made by a party opponent, dying declarations, and entries made in the normal course of business or medical practices. Id. All of these exceptions have components of reliability which courts have traditionally recognized as satisfying the same goals as cross-examination and thus courts have admitted such statements even where cross-examination is not possible because the declarant is not present.

When the proffered evidence does not fit a firmly rooted exception, the evidence is excluded unless it possesses particularized guarantees of trustworthiness which has been further defined as being when the declarant's truthfulness is so clear from the surrounding circumstances that cross examination would be of slight utility. Id. This is the test for constitutional admissibility under the Sixth and Fourteenth Amendments and this admissibility creates the federal question which is cognizable upon habeas review. See Idaho v. Wright, supra;

White v. Illinois, supra; California v. Green, 399 U.S. 149 (1970); Dulton v. Evens, 400 U.S. 74 (1970); Pointer v. Texas, 380 U.S. 400 (1945).

The theoretical underpinning of the reliability of the present declaration of the speaker's state of mind exception embodied in Rule 803(3) lies in the spontaneity of the contemporaneous statement. Like the excited utterance, this contemporaneous spontaneity makes it less likely that the speaker has an opportunity to fabricate and thus the spontaneity component has been traditionally held to be an adequate substitute for cross-examination. Idaho v. Wright, supra at 820. However, when the statement is not spontaneous because it does not involve the speaker's current state of mind but merely reports historical events, the same underlying reliability is not present and the goals of cross-examination are not satisfied because the speaker has had time to reflect on the statement. Thus the reporting of historical matter does not fit within Rule 803(3) even if one could infer the speaker's state of mind from the historical report. See Shepard v. United States, supra. And, in fact, reporting of historical facts when the historical mater is offered to prove the truth of the matter asserted has been specifically excluded from the exception. "The state of mind exception does not permit the witness to relate any of the declarant's statements as to why he held a particular state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition." United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980).

The phrase, "I'm angry with John Hayes" has been deemed more reliable than the phrase, "John Hayes hit me with his fist every morning since we were married." Thus Rule 803(3) traditionally admits the first phrase but excludes the second. And only this "present declaration of state of

mind" component satisfies the firmly-rooted exception required by the Sixth Amendment. Id. Note 2.

Thus while states may fashion rules of evidence which allow unavailable victims to identify their "fear, pain and other emotional states" as well as to identify the "source of that fear, pain and emotion," the only constitutionally appropriate method for admitting such evidence when it does not satisfy the traditional spontaneity requirement of Rule 803(3) is to establish independent guarantees of trustworthiness. See Ohio v. Roberts, supra.

Fear, pain and emotion evidence which is not trustworthy and which does not comport with Rule 803(3) is constitutionally inadmissible regardless of how many misguided prosecutors, trial judges, appellate judges or legislators label such evidence as "state of mind."

For centuries, hearsay which did not comport with traditional firmly-rooted exceptions was often admitted as "res gestea" by courts whose understanding of the complexities of the laws of evidence was intellectually challenged. Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922) See also McCormick on Evidence, pp. 686-687. Most courts have long since abandoned the amorphose "res gestea" label. But today, far too many courts who suffer from the same lack of evidence law scholarship are too quick to call evidence "state of mind" even when such evidence would be admissible under a more exotic hearsay exception. As the Brown court acknowledged:

> [T]here are a number of other cases which have allowed in testimony of this type on the basis of various errors in reasoning or simple lack of concern. One of the principle problems which brings this about is a court's understandable eagerness to find an easy rule, simple in operation. This leads to a tendency to adopt a mechanistic approach devoid of analysis. For example, in State v. Radabaugh, 471 P.2d 582 (Id. 1971) (citation omitted), the Idaho Supreme Court, dealing with a hearsay declaration of fear on the part of a deceased victim, simply identified the statement as probative on the issue of state of mind of the declarant, referred to the fact that a limiting instruction had been given and then pronounced it admissible in a conclusory and off-handed manner.
>
> United States v. Brown, 490 F.2d at 772 (D.C. Cir. 1973).

What is most important to note here is that despite the State's protestations to the contrary, the North Carolina Court of Appeals' ruling in Hayes that the hearsay was admissible under 803(3) was not affirmed by the North Carolina Supreme Court. Rather, the Supreme Court of North Carolina ruled that Judge Saunders' evidentiary rulings were not subject to appellate review because counsel failed to contemporaneously object to their admission. State v. Hayes, 350 N.C. 79, 80 (1999). Thus, the Court of Appeals' decision affirming Mr. Hayes's conviction was affirmed by the Supreme Court but the ruling that the hearsay was admissible under 803(3) was rendered a non-decision by means of the North Carolina Supreme Court's holding that appellate review was not properly preserved.

Here, the firmly-rooted exception embodied in Rule 803(3) does not permit the admission of this suspect evidence.

Furthermore, the second prong of Roberts is also absent and thus these statements do not qualify as admissible residual hearsay or "spousal abuse hearsay" because they do not possess particularized guarantees of trustworthiness. See Idaho v. Wright, 497 U.S. 805 (1990). Under U. S. Supreme Court jurisprudence, the test is whether "the declarant's trustfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." Id. at 819.

Here, the statements offered came from Mrs. Hayes' female compatriots and men with whom she was having adulterous affairs. No reasonable jurist could ever guarantee that these statements were particularly trustworthy. Their admission violated the Sixth Amendment.

It is this lack of trustworthiness of the sixteen out-of-court statements that distinguishes this case from the unreported case of Mixon v. McDade, 6:96V00031 (M.D.N.C.), aff'd,. 139 F.3d 891 (4th Cir. 1998) (unpublished). It is truly unfortunate that this opinion has no value as precedent because it actually supports the Petitioner's position here.

In Mixon, direct evidence was presented that the petitioner there had been repeatedly abusive. (State's exhibit 7, page 3). Also, Ms. Mixon's psychiatrist testified that Ms. Mixon said she had been so harassed and threatened by her husband that she obtained a restraining order and Ms. Mixon's divorce lawyer reported Ms. Mixon's prior claim of assault and property damage by the spouse-petitioner. This evidence was guaranteed to be particularly

trustworthy under the circumstances of its making thus satisfying the Confrontation Clause even though the evidence was improperly analyzed under 803(3) by the Middle District magistrate judge. Here, Mrs. Hayes reported no abuse to her lawyer, her doctor, her nurse or her housekeeper and there was no repeated direct evidence of incidents of abuse. The only witnesses who claimed that Fran Hayes said John Hayes abused her were her fellow bar-hoppers to whom she was trying to justify her adulterous life style. No reasonable jurist could find these circumstances to be particularly trustworthy and thus reliability was not established under either prong of Roberts. Thus, when these suspect statements were paraded before the Hayes jury, John Hayes' fundamental Sixth and Fourteenth Amendment rights were violated and this lack of constitutional admissibility proves his counsel's failure to contemporaneously object was ineffective assistance, also in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

In the Order of the district court, Judge Mullen conceded that these statements do not fit the traditional exception embodied in 803(3). However, Judge Mullen felt bound by Mixon's comment that North Carolina was free to define its own state of mind exception.

Mixon's analysis does not comport with firmly rooted Federal Constitutional Law because merely calling historical evidence state of mind does not make the hearsay exception firmly rooted. However, the flood of evidence in Mixon which guaranteed trustworthiness makes the Mixon result unassailable because confrontation interests were constitutionally satisfied.

Likewise, Judge Luttig's Circuit opinion which held the state court evidentiary rulings that the admission of hearsay did not violate the confrontation clause were not

contrary to clearly established federal law was in error. See Hayes v. York supra at 925. North Carolina's permissive interpretation of the state of mind exception allowing the declarant to report historical facts makes such admissions into evidence contrary to the firmly rooted state of mind hearsay exception. Shepard v. United States, supra, clearly defines the perimeter of the state of mind exception forbidding factual declarations. Thus, the North Carolina rule, by running afoul of Shepard make these state court adjudications contrary to clearly established federal law as that phrase has been interpreted in the 28 U.S.C. section 2254 context by this Court in Williams v. Taylor, 529 U.S. 362, 412 (2000). Thus, it was error to find that Hayes claim was not cognizable on federal habeas review.

CONCLUSION

The Petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of February, 2003.

/s/ Lyle J. Yurko

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN FRANCIS HAYES,
Petitioner-Appellant,

v. No. 02-6240

MICHAEL YORK, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Chief District Judge.
(CA-00-399-3-MU)

Argued: September 23, 2002
Decided: November 22, 2002
Entered: November 22, 2002

Before LUTTIG and WILLIAMS, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Luttig wrote the opinion, in which Judge Williams and Senior Judge Hamilton joined. Senior Judge Hamilton wrote a concurring opinion.

COUNSEL

ARGUED: Lyle Joseph Yurko, YURKO & OWENS, P.A., Charlotte, North Carolina; Michael Smith Scofield, Charlotte, North Carolina, for Appellant. Clarence Joe DelForge, III, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

ON BRIEF: Thomas M. Dawson, Leavenworth, Kansas, for Appellant. Roy Cooper, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

OPINION

LUTTIG, Circuit Judge:

Appellant, John Francis Hayes, filed a petition for habeas relief in the district court under 28 U.S.C. § 2254. The district court denied Hayes' petition, but granted him a certificate of appealability, 28 U.S.C. § 2253, on the question of whether the admission of various hearsay statements during his trial violated his rights under the Sixth Amendment Confrontation Clause. We deny Hayes' petition because the admission of the statements was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.

I.

In 1996, Hayes was convicted in state court for the second degree murder of his wife. At trial, North Carolina offered evidence that Hayes and his wife, Mrs. Hayes, had a turbulent, unfaithful, and abusive marital relationship, which ended with a 1994 altercation that resulted in Mrs. Hayes' death. Hayes claimed he killed his wife in self-defense, as she attacked him with a hammer and baseball bat. In rejoinder to Hayes' claim of self-defense, the state introduced state-of-mind declarations, which Mrs. Hayes made to friends and boy-friends, indicating that she was not aggressive towards her husband, but rather was fearful of him. The hearsay testimony included factual assertions made by Mrs. Hayes in conjunction with and explanation of her emotions and feelings, such as assertions that Hayes physically abused and threatened to kill her.[1] Throughout the trial, Hayes maintained that he had never abused or threatened his wife and that the hearsay statements were unreliable.

---

[1]*E.g.*, "[Mrs. Hayes] came in and it was apparent to me she was upset.. . . I asked her what was wrong. She said she and John had been into it again. She wanted to know if I was going to tell her how stupid and dumb she was for putting up with it and not leaving. I told her, "no," I wasn't going to tell her anything like that. She said, "don't you want to know." I asked her why. She said John told her that if she ever left him he would kill her, and he would see her dead before she ever had any of his money." (J.A. at 1737); "[Mrs. Hayes] came in and sat down, and her eyes were all swollen which looked like from crying. And I asked her what was wrong. And she said, "I almost didn't come tonight." I asked her why. She said John was in one of his rages again. And I asked her what happened. And she said he got angry with her and unzipped his pants and urinated on the kitchen floor in front of her and then pushed her down and put her head down in it and wiped the floor up with her hair." (J.A. at 1754).

Before trial, the prosecution noticed the defense that it intended to proffer the hearsay statements from Mrs. Hayes' friends and boyfriends. Because the statements included factual assertions, in addition to Mrs. Hayes' emotions, Hayes objected *in limine* to their admission. The state hearings court, after a *voir dire* hearing, determined that some of the statements were admissible under North Carolina's state-of-mind hearsay exception, N.C.R.E. 803(3), and that some were admissible under the state's residual hearsay exception, N.C.R.E. 804(b)(5). The court made clear that its decision was without prejudice and that objections could be remade at trial. At trial, however, Hayes' counsel did not object to the hearsay statements as the witnesses made them.

After his conviction, Hayes argued on appeal that admission of the challenged hearsay statements was error. The appellate court reviewed the statements and concluded that the lower court had properly admitted them under N.C.R.E. 803(3) and 804(b)(5). Hayes continued his appeal, successfully petitioning the North Carolina Supreme Court for discretionary review. That court, though granting review, held that the appellate court had erred in reviewing the statements because "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to [] object to that evidence at the time it is offered at trial," *State* v. *Hayes*, 350 N.C. 79, 80 (1999), and thus never reviewed the statements' admissibility.

Having exhausted direct review of his conviction, Hayes filed a motion for appropriate relief in state court (*i.e.*, a state habeas petition). The court held that Hayes' counsel's performance was deficient, contrasting North Carolina's well-established rule requiring contemporaneous objection to an evidentiary proffer to preserve the objection for appeal, with Hayes' counsel's failure to object to the hearsay

testimony he initially challenged *in limine*. Still, the court held that Hayes' claim ultimately failed because the statements at issue were admissible under N.C.R.E. 803(3) and 804(b)(5), citing North Carolina precedent and incorporating the appellate court's analysis from Hayes' direct appeal. Hayes' subsequent petition for certiorari to review the habeas denial was rejected.

Hayes then brought this federal habeas action claiming ineffective assistance of counsel. The district court denied the petition for habeas corpus relief, but granted a certificate of appealability, so Hayes might bring an appeal.

II.

Under *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000), when reviewing a petition under 28 U.S.C. § 2254, we must determine if state court adjudication was contrary to or involved unreasonable application of clearly established federal law, as determined by the Supreme Court. Thus, we solely inquire whether the state courts' determination that the hearsay statements were admissible is either contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

Hayes may prevail under the "contrary to" analysis only if the state courts' conclusion of law is directly opposite to one reached by the Supreme Court or if those courts decided his case differently than one decided by the Supreme Court on materially indistinguishable facts. *Id.* Under the "unreasonable application" analysis, Hayes may prevail only if the state courts unreasonably applied clearly established principles of Supreme Court law to the facts of Hayes' case. *Id.* None of these circumstances is met here.

A.

The Supreme Court has held that the Confrontation Clause allows the admission of hearsay evidence against criminal defendants if it falls within a "firmly rooted hearsay exception" or possesses "particularized guarantees of trustworthiness," *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980); *see also Idaho* v. *Wright*, 497 U.S. 805, 815 (1990). Here, Hayes concedes that N.C.R.E. 803(3) embodies a firmly-rooted exception, one for state-of-mind declarations, *see* Appellant's Br. At 17, but he argues that the state courts erred in admitting, under N.C.R.E. 803(3), the portions of the hearsay conveying factual assertions, since such portions lack the spontaneity of an expression of feeling, *see id.* at 19 ("[t]he theoretical underpinning of the reliability of [state-of-mind hearsay] lies in [its] spontaneity[, like the excited utterance exception]"). This question, however, is unreviewable in federal court as it solely concerns state law, over which this court has no authority. Before this court, Hayes' only real objection could be that North Carolina's state-of-mind hearsay exception (at least as applied by the state courts in his case), does not fairly constitute one of the firmly-rooted hearsay exceptions. While it is not entirely clear to us if Hayes' intended to raise or did raise this point in the briefs or at oral argument, particularly in light of his contrary concession as to the nature of N.C.R.E. 803(3), we would reject it for the reasons below.

As an initial matter, the Supreme Court never has questioned that a state-of-mind hearsay exception is one of the firmly-rooted hearsay exceptions. The history of the state-of-mind exception is long and distinguished, *see Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892); Advisory Committee Notes to F.R.E. 803, and the exception exists in every jurisdiction in the country, whether by statute, court rule, or common law tradition. North Carolina is on safe

ground assuming that a firmly-rooted state-of-mind exception exists, and that it may codify it.

Whether North Carolina's state-of-mind hearsay exception encompasses declarations that do not fit within the firmly-rooted state-of-mind hearsay exception recognized by Supreme Court precedent can only be answered by looking to what the Supreme Court has said about the basis and character of the firmly-rooted state-of-mind exception. But, the Supreme Court has not much addressed the exception's basis or character. In *Mutual Life Ins. Co.* v. *Hillmon*, the seminal case confirming the admissibility of state-of-mind declarations, in which was addressed letters conveying both intention *and* underlying facts from which the intention arose, the Court did not distinguish between the different portions of the hearsay. *See* 145 U.S. at 288-89, 299-300. Nor did the Court, as Hayes claims, draw such a distinction in the case of *Shepard* v. *United States*, 290 U.S. 96 (1933). In *Shepard*, the Court rejected the statements because they contained no express reflection of a state-of-mind. The Court said the statements reflected only the declarant's belief about facts, and the prosecution's last minute attempt to *infer* a state-of-mind from them was a transparent ploy to put the facts before the jury. *Id.* at 102-04, 106. Here, even Hayes recognizes that *part* of the statements conveyed emotions and feelings.

The Supreme Court has simply never held, nor even suggested, that state-of-mind declarations that *also* convey factual assertions (where such form the basis for the state-of-mind) do not fit within the firmly-rooted state-of-mind exception, nor that the portion of a state-of-mind declaration containing an underlying factual assertion must be carved out from the qualifying statement. Thus, North Carolina's determination that N.C.R.E. 803(3) is a Sixth Amendment-compliant, firmly-rooted, state-of-mind hearsay exception,

even as it reaches to statements such as are at issue here, is not contrary to Supreme Court precedent.

Nor has the Supreme Court ever articulated the principle Hayes contends forces the conclusion that Supreme Court law was unreasonably applied in this case: that spontaneity forms the basis for the reliability of state-of-mind declarations. *Cf.* Appellant's Br. at 19. For though the Supreme Court does base the categorical admission of hearsay that falls within firmly-rooted exceptions on the notion that each such exception has a well-established basis for reliability, *see Ohio* v. *Roberts*, 448 U.S. at 66; *Idaho* v. *Wright*, 497 U.S. at 817, the Court has never said that spontaneity is the basis for the reliability of state-of-mind declarations. Thus, Hayes has no basis *in Supreme Court law* from which to argue that admission of the parts of the state-of-mind declarations that lack spontaneity resulted in N.C.R.E. 803(3) reaching to statements excluded from the firmly-rooted state-of-mind exception. Consequently, the state courts did not unreasonably apply Supreme Court law in admitting the statements.

Hayes' contention that spontaneity forms the basis for the reliability of state-of-mind declarations may, as a theoretical matter, have merit. *See* Advisory Committee Notes to F.R.E. 803(3); *see also Boliek* v. *Missouri*, 479 U.S. 903 (1986) (Marshall, J.) (*dissenting from denial of cert.*) ("[t]here can be no doubt, given the use made of the evidence by the State in summation, that the testimony as to the victim's statements was admitted to prove not her state of mind, but the truth of her belief that petitioner intended to kill her. *Cf.* F.R.E. 803(3) (statements of memory and belief not admissible to `prove the fact remembered or believed')."). But since the Court has not clearly established the principle, this habeas claim fails.

North Carolina's interpretation of its state-of-mind exception, as both consistent with the firmly-rooted exception *and* reaching to statements that contain underlying factual assertions, is shared by a number of other jurisdictions. *See, e.g., State* v. *Simko*, 644 N.E.2d 345 (Ohio 1994); *Commonwealth* v. *Hunter*, 416 Mass. 831 (1994); *State* v. *Steinbuch*, 514 N.W.2d 793 (Minn. 1994); *State* v. *Wood*, 881 P.2d 1158 (Ariz. 1994); *State* v. *Smith*, 868 S.W.2d 561 (Tenn. 1993); *State* v. *Losson*, 865 P.2d 255 (Mont. 1993); *Bolin* v. *State*, 544 N.E.2d 1372 (Ind. 1989); *State* v. *Lamb*, 767 P.2d 887 (Okla. Crim. 1988). And the Supreme Court has never suggested that these state courts have erred in interpreting the firmly-rooted state-of-mind exception to reach to state-of-mind declarations that also convey underlying factual assertions. The large number of like-minded states, all having examined their evidentiary rules against *Ohio* v. *Roberts* and *Idaho* v. *Wright*, reinforces our conclusion that N.C.R.E. 803(3), as interpreted by the North Carolina courts, reasonably applying Supreme Court law, is a firmly-rooted exception.

B.

The admission of the remaining statements under N.C.R.E. 804(b)(5) was also not contrary to, nor an unreasonable application of Supreme Court precedent. The North Carolina courts, like the majority of states, have formulated a standard by which to determine whether or not a statement has "particularized guarantees of trustworthiness," which allow a statement to be admitted under the residual hearsay exception and in accordance with the demands of the Sixth Amendment. While the Supreme Court has said that evidence admitted under residual hearsay exceptions "must [] be so trustworthy that adversarial testing would add little to its reliability," *Idaho* v. *Wright*, 497 U.S. at 821, the Court has also "decline[d] to endorse a mechanical test for determining [this question of

reliability]," *id.* at 822, and has instead left it to the states to develop their own approaches.

The standard that the North Carolina courts have formulated for evaluating whether hearsay evidence has particularized guarantees of trustworthiness sufficient to admit it under N.C.R.E. 804(b)(5) satisfies the Constitution's demands. North Carolina courts inquire as to (1) assurances of the declarant's knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant. . . ." *See State* v. *Hayes*, 130 N.C.App. at 174. The second and fourth factors perfectly satisfy Supreme Court precedent, *see Idaho* v. *Wright*, 497 U.S. at 814, 821-22. The first factor is reasonably construed to advance the purpose of excluding evidence that does not bear an "indicia of reliability," *Ohio* v. *Roberts*, 448 U.S. at 65, because it ensures that only hearsay spoken by a person with demonstrated knowledge of the subject in question will be admitted under the rule. And the third factor functions not as a test for determining if particularized guarantees of trustworthiness exist, *cf. Idaho* v. *Wright*, 497 U.S. at 819 ("the relevant circumstances include only those that surround the making of the statement,"), but simply as a heightened barrier to state law admissibility, above and beyond the constitutional threshold, serving to exclude statements *made* with particularized guarantees of trustworthiness, but which courts *later* mistrust.

In this case, the appellate court confirmed that the trial court identified the correct North Carolina standard and properly applied it. *See State* v. *Hayes*, 130 N.C.App. at 174 ("the determination of trustworthiness is fully supported by [] findings in th[e] record . . ."). The state superior court considering Hayes' habeas petition reached

the same conclusion (J.A. at 170-73). Our review of the evidence confirms that their conclusion is justified.

Because the North Carolina standard is not contrary to the Supreme Court's command nor was applied to the facts of this case in an unreasonable manner, there was no violation of clearly established Supreme Court law.

CONCLUSION

The state habeas court properly concluded, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), that Hayes had not been denied effective assistance of trial counsel because counsel's failure to object had not in any way prejudiced him. *See id.* at 687. Admitting the statements was not contrary to nor an unreasonable application of Supreme Court precedent, and any objection by Hayes' counsel would have been overruled, consistent with North Carolina law. Thus, contemporaneous objection would have changed nothing. *A fortiori*, denial of Hayes' ineffective assistance of appellate counsel claim was proper as well.

The district court's denial of Hayes' section 2254 petition for relief is hereby affirmed.

AFFIRMED

HAMILTON, Senior Circuit Judge, concurring:

I concur in Judge Luttig's thorough opinion. I write separately only to add my view that, in addition to failing to demonstrate that counsel's performance was deficient, Hayes has failed to demonstrate any prejudice flowing from the alleged erroneously admitted hearsay evidence. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

According to Hayes, there is a reasonable probability that, had the challenged hearsay evidence, which included factual assertions made by Mrs. Hayes in conjunction with

an explanation of her feelings, such as assertions that Hayes physically abused and threatened to kill her, been excluded, the State would have been unable to demonstrate that the killing was done with malice.

Under North Carolina law, the unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree. *State v. Geddie*, 478 S.E.2d 146, 156 (N.C. 1996). The State may prove malice by the nature of the attack with a deadly weapon. *State v. Robbins*, 309 S.E.2d 188, 190 (N.C. 1983). In this case, Hayes savagely beat his wife to death with a baseball bat causing extensive, severe damage to her skull. Hayes then poured gasoline (or a similar flammable liquid) on her body and set her on fire. It is hard to imagine a murder which more clearly demonstrates malice than the facts of this case. The exclusion of the challenged hearsay evidence would have done nothing to alter the jury's conclusion that the murder of Mrs. Hayes was committed with malice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:00CV399-MU

JOHN FRANCIS HAYES,
Petitioner,

vs.

MICHAEL W. YORK,
Supt. Of Albemarle Correctional Inst.,
Respondent.

ORDER

ENTERED: January 2, 2002

This matter is before the court upon Petitioner's Petition Pursuant to 28 U.S.C. § 2254. Petitioner John Francis Hayes ("Hayes"), a prisoner in the State of North Carolina, challenges his 1996 conviction in Mecklenburg County for second degree murder of his wife for which he received a life sentence. Hayes seeks an Order vacating the State of North Carolina's Judgment against him and directing the State to hold a new trial, or in the alternative a resentencing hearing, claiming that the Judgment against him violates Due Process Clause of the Fifth Amendment, the Effective Assistance of Counsel Clause of the Sixth Amendment, and Hayes's Right to Confront and Cross-Examine the Witness Against Him secured by the Confrontation Clause of the Sixth Amendment. Hayes has exhausted his state court remedies. Both the Petitioner and the State have moved for summary judgment.

FACTS

On November 26, 1996, a jury in the Superior Court of Mecklenburg County found Hayes guilty of second degree murder in the killing of his wife, Francis Hammil Hayes ("Mrs. Hayes") on July 13, 1994. At trial, the State offered a great deal of evidence tending to show that the Petitioner and his wife had a turbulent and abusive relationship. Evidence was introduced that Petitioner had been physically and verbally abusive to Mrs. Hayes as far back as 1984. Much of this evidence was in the form of statements that Mrs. Hayes made to various friends, all of which involved acts of violence or threats of violence by the Petitioner over a ten year period of time. These hearsay statements were admitted by the trial court pursuant to North Carolina Rule of Evidence 803(3), allowing hearsay statements that express the state of mind of the declarant, and Rule 804(b)(5), the residual hearsay exception. There was also evidence that Mrs. Hayes was verbally abusive to her husband and carried on numerous affairs.

On July 13, 1994, police officers were called to Petitioner's home. Petitioner met the officers at the door and took them to the garage where they found the beaten and burned body of Mrs. Hayes covered by newspaper. There was a great deal of blood in the garage and cleaning materials were found close by. It appeared that the body had been moved and burned after death. Gasoline or some other accelerant had been poured on her body. The medical examiner determined that Mrs. Hayes died from blows to the head, neck, torso and legs. Petitioner offered evidence that he was acting in self defense, in that Mrs. Hayes first attacked him in the garage by throwing a hammer. He then took a baseball bat from her and began hitting her with it. At that point he entered into a dissassociative state during which he attempted to clean the garage and "undo" what he had done.

The North Carolina Court of Appeals affirmed Haye's conviction and sentence of life imprisonment. State v. Hayes, 130 N.C.App. 154, 502 S.E.2d 853 (N.C.App. 1998). The Supreme Court of North Carolina modified the Court of Appeals opinion holding in relevant part that a motion *in limine* is insufficient to preserve evidentiary rulings for appellate review and trial counsel's failure to make a contemporaneous objection at the time the hearsay evidence was admitted forfeited appellate review of the evidentiary rulings. State v. Hayes, 350 N.C. 79, 80, 511 S.E.2d 302 (N.C. 1999). Petitioner filed a Motion for Appropriate Relief ("MAR") in the Superior Court of Mecklenburg County on February 8, 2000 which was denied on June 13, 2000. Petitioner's Petition for Writ of Certiorari was denied by the North Carolina Court of Appeals on July 26, 2000.

DISCUSSION

The governing standard in this habeas action is explained by the Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000):

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfies -- the state court adjudication resulted in a decision that (1) 'was contrary to ...clearly established Federal law, as determined by the Supreme Court of the United States;' or (2) 'involved an unreasonable application of ...clearly established Federal law, as determined by the Supreme Court of the United States.' Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court

has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

529 U.S. at 412.

Petitioner cites four grounds for his § 2254 petition:

1) he was denied effective assistance of counsel at trial as guaranteed by the Sixth Amendment; 2) North Carolina's rule requiring contemporaneous objections violates the Due Process Clause of the Fifth Amendment; 3) Petitioner's sentencing violated the Due Process Clause; and 4) he was denied effective assistance of counsel on appeal as guaranteed by the Sixth Amendment. The court will address each argument in turn.

A. Ineffective Assistance at Trial:

Petitioner argues that he was denied effective assistance of counsel because trial counsel failed to make contemporaneous objections to hearsay evidence offered by the State. At trial, the State proved much of its case against Petitioner by introducing sixteen out of court statements by Mrs. Hayes made to friends and lovers over the last ten years of the Hayes' troubled marriage. The statements all involved acts of violence or threats by Petitioner upon his wife. The statements that were admitted without contemporaneous objection from Petitioner's attorneys were as follows:

1) In 1994, Mrs. Hayes told a friend, Jean Coffey, that the defendant told Mrs. Hayes that "if she ever left him he would kill her, and he would see her dead before she ever had any of his money." She also said that Coffey "thought [she] was dumb and stupid...for not leaving."

2) On July of 1994 Mrs. Hayes told Mary Losee that the defendant was calling her "Nicole" and that she was going to end up like Nicole Simpson.

3) In 1992, Mrs. Hayes told Mary Lossee that John "got angry with her...urinated on the kitchen floor [and] put her head down in it and wiped the floor with her hair."

4) In early July 1994, Mrs. Hayes told Pete Chambers (her lover) that John told her she was "the next Nicole Simpson."

5) On July 8, 1994 Mrs. Hayes told Chambers that John had "choked her," urinated on the floor," and "threatened her with their dog."

6) Mrs. Hayes told Jennifer Smathers that she thought that her husband "was going to kill me one day."

7) In 1984, after Mrs. Martin, a friend of the victim, asked Mrs. Hayes about a bruise on her face, Mrs. Hayes replied that she "ran into [the defendant's] fist."

8) In 1994, Mrs. Hayes "almost every week talked about...the verbal abuse or whatever physical abuse she [received from Hayes]."

9) Mrs. Hayes told Jennifer Smathers that her husband "even threatened to kill the[ir] dog."

10) Mrs. Hayes told Jim Pence (a lover) that John had "shoved her down" and had stated that "he could not wait to get her underground."

Prior to trial, Petitioner's attorneys filed a motion *in limine* seeking to exclude these statements. The trial judge issued a twenty page written order ruling some of the proffered evidence admissible under North Carolina Rule of Evidence 803(3), an exception to the hearsay rule when the evidence constitutes a present declaration of the state of mind of the declarant. The rest of the evidence was ruled admissible under the residual hearsay exception of Rule 804(b)(5). When the evidence was offered to the jury, Petitioner's attorneys failed to object at that time, relying on the court's notation of their standing objection at a bench conference held prior to the trial evidence.

On appeal, the State argued that failure to contemporaneously object to the hearsay barred appellate review. The North Carolina Court of Appeals found that the motion *in limine* preserved the hearsay issues for review,

and affirmed the admission of the statements. The North Carolina Supreme Court, however, held that a failure to lodge a contemporaneous objection did not preserve the issue for appeal and expressly declined discretionary review (as improvidently granted) of the underlying merits of the admissibility of the hearsay statements. In Petitioner's post-conviction MAR, the Superior Court found that while counsel's performance was deficient by not properly preserving the hearsay issue for appeal, the evidence was not erroneously admitted and there was no probability of a different outcome on appeal.

Under the test of Strickland v. Washington, 466 U.S. 668 (1984), to show ineffective assistance, Petitioner must show both a professional dereliction and a reasonable probability of a different result. The court finds that trial counsel's failure to contemporaneously object to the admissibility of the statements at issue was certainly a professional dereliction. Thus, the court must determine whether such a dereliction resulted in prejudice to the Petitioner. In order to make this determination the court must examine whether the decision to admit the evidence was error and if so, had the evidence been excluded, a different result would be reasonably probable.

The threshold issue before the court is whether the hearsay statements were erroneously admitted. The North Carolina Court of Appeals, in a decision on the merits, found that the statements were properly admitted under either Rule 803(3) of the North Carolina Rules of Evidence (then existing mental, emotional, or physical condition) or Rule 804(b)(5), the "catch-all" or residual hearsay exception where the declarant is unavailable and the statement has certain guarantees of trustworthiness. Under Williams, this court must determine if the decision of the North Carolina Court of Appeals as to the admissibility of the hearsay statements "involved an unreasonable application

of...clearly established Federal law, as determined by the Supreme Court of the United States." 529 U.S. at 412.

The Supreme Court has stated repeatedly that in order to satisfy the Confrontation Clause, the evidence must be reliable and that reliability is established only when the evidence either falls within a "firmly rooted hearsay exception" or possesses "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980); Idaho v. Wright, 497 U.S. 805, 815 (1990). The Confrontation Clause "bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." Wright, 497 U.S. at 814.

Rule 803(3) of the North Carolina Rules of Evidence is identically worded to its federal counterpart and reads as follows:

> (3) Then Existing Mental, Emotional, or Physical Condition.-- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This "state of mind" exception is considered a "firmly rooted" exception to the hearsay rule, as, as such, possesses "indicia of reliability." See United States v. Brown, 490 F.2d 758, 762 (D.C. 1973). North Carolina Rule of Evidence 804(5) is the residual hearsay exception and, as such, is not a

"firmly rooted" exception. The Rule reads in pertinent part as follows:

> Other Exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstancial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Statements which do not fit within a firmly rooted hearsay exception must possess "particularized guarantees of trustworthiness" in order to comply with the Confrontation Clause. In other words, the declarant's truthfulness must be "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." Wright, 497 U.S. at 820.

The question before the court is whether the statements at issue fit within the state of mind exception, and if not, whether they possess particularized guarantees of trustworthiness so as to come in under the residual exception. Many of the statements admitted are in the nature of statements of historical fact from which one may be able to *infer* Mrs. Hayes' state of mind, but in and of themselves, do not appear to relate a state of mind or physical condition. There are no statements such as "I'm afraid of John" which would clearly fit within this exception. Under very similar factual circumstances, however, the Fourth Circuit has ruled that North Carolina's

state of mind exception under Rule 803(3) is a "firmly rooted" exception to the hearsay rule. In Mixion v. Attorney General, *et al.*, 139 F.3d 891 (4th Cir. 1998) (unpublished), the petitioner, after being convicted of murdering his wife, raised almost identical Confrontation Clause claims as raised herein challenging the North Carolina trial court's admission of several hearsay statements made by the wife to friends and relatives that petitioner had threatened to kill her, had harassed her, had previously assaulted her and damaged her property, and that she had obtained a restraining order against him. None of the statements were accompanied by an expression of her emotional state or feelings. She did not state that she was fearful of the defendant, but merely related facts that since the evidence *related directly* to her state of mind, it was admissible under803(3). After analyzing the standard of review under § 2254(d)(1), and emphasizing the deference that should be afforded state court decisions in these cases, the court squarely rejected Mixion's Confrontation Clause claim on its merits.

In denying Mixion's Confrontation Clause claim, the court pointed out that North Carolina as well as a number of other state courts regularly admit the kind of hearsay evidence challenged here under the firmly rooted exception for state of mind evidence. These state courts allow hearsay statements of unavailable victims to identify not only their fear, pain or other mental, physical or emotional state, but also the source of that fear, pain or other mental, physical or emotional state. See e.g., State v. Alston, 341 N.C. 198, 229-31, 461 S.E.2d 687 (1995) (trial court did not err in murder prosecution in admitting hearsay statements by the victim that she was afraid of defendant, that she was receiving threatening phone calls from defendant, that defendant told her she had a beautiful face and he would "mess it up", and that she believed defendant was going to kill her. These statements admissible under state of mind exception to

hearsay rule found in Rule 803(3).), cert. denied, 516 U.S. 1148 (1996); State v. McHone, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to murder), cert. denied, 511 U.S. 1046 (1994); State v. Lynch, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (defendant's threats to victim shortly before murder admissible to show victim's then existing state of mind); State v. Cummings, 326 N.C. 298, 313, 389, S.E.2d 66, 74 (1990) (victim's statements that defendant had beaten her and threatened her admissible under Rule 803(3) because "the scope of the conversation...related directly to [the victim's] existing state of mind and emotional condition."); State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990) (victim's statements to her son that defendant had threatened her "revealed her then-existing fear of the defendant...") State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992), cert. denied, 508 U.S. 919 (1993); State v. Lamb, 767 P.2d 887, 890 (Okl. Cr. 1988) (testimony of witnesses to effect that victim had told them that defendant had previously committed battery on her and threatened her and that she was afraid of him, was admissible under state of mind exception to hearsay rule), denial of habeas corpus affirmed, 60 F.3d 837 (10th Cir, 1995); Bolin v. State, 544 N.E.2d 1372 (Ind. 1989) (in prosecution of wife for murder of husband, testimony of several witnesses that several months prior to his death, victim had on several occasions made statements to the effect that wife might shoot him, and that she had pursued him on prior occasions and possibly had fired a shot at him were admissible as relevant to prove victim's state of mind where wife presented theory of self-defense.); State v. Simko, 71 Ohio St.3d 483, 644 N.E.2d 345 (1994) (testimony that victim attempted to avoid defendant on night before murder and statements indicating her fear of defendant and that victim changed her telephone number because defendant kept calling her after being told to stop was relevant in trial on murder charge and was admissible under state of mind

exception to hearsay rule), cert. denied, 516 U.S. 831 (1995); State v. Losson, 262 Mont. 342, 865 P.2d 255 (1993) (victim's statement to naval recruiter that he "was afraid of" defendant and "thought she was going to kill him" satisfied hearsay exception for then existing mental, emotional or physical condition, in that statement offered to explain victim's state of mind where he sought to re-enlist to active duty).

While some federal circuit courts follow a more restrictive state of mind exception to the hearsay rule, state courts are under no obligation to follow federal circuit court interpretations of similar, or even identical, federal rules of evidence, when construing their own state rules of evidence. State courts must only comply with the United States Supreme Court decisions interpreting and applying federal constitutional law. See 28 U.S.C. § 2254(d)(1). In light of Mixion as well as the numerous North Carolina cases cited therein, the court finds that the North Carolina court's interpretation and application of its own state of mind exception to the hearsay rule is valid and does not violate the Confrontation Clause or any other constitutional provision.

The court also finds that the state court's admission of other hearsay statements under Rule 804(b)(5) is not unreasonable. The court determined that the testimony in question possessed circumstantial guarantees of trustworthiness. This determination was supported by the evidence in the record.

Even if counsel had properly objected to the hearsay and the trial court had reversed itself and excluded all of the challenged hearsay statements, the court finds that there is still no reasonable probability of a different outcome in this case because the jury could have still found malice from the extensive damage to the victim's skull. Under North

Carolina law, malice may be proven by the nature of the attack with a deadly weapon. See State v. Robbins, 309 N.C. 771, 775, 309 S.E.2d 180(1993). The evidence at trial showed that Petitioner savagely beat his wife to death with a baseball bat causing extensive damage to her skull. The autopsy revealed severe blunt force injuries to the head, injuries to the neck, and fractured ribs. Moreover, the evidence showed that after the victim's death, Hayes poured gasoline on her body and set her on fire. The court finds that the evidence of malice is such that even absent the hearsay statements, it is not reasonably probable that the jury would have rendered a different verdict.

B. Due Process and Contemporaneous Objections:

The Petitioner argues that North Carolina's rule requiring that a contemporaneous objection to evidence be lodged by counsel at trial to preserve an issue for appeal when the admissibilty of the evidence has been fully litigated prior to trial violates the Due Process Clause of the Fifth Amendment because it is outdated and serves no legitimate purpose. In this case, Petitioner argued against the admission of the hearsay testimony in a motion *in limine*. The trial judge decided to admit the testimony in a detailed written order. At trial, counsel asked for, and was granted, a standing objection to the admissibility of the evidence. However, the North Carolina Supreme Court ruled that even these circumstances, the failure to contemporaneously object to the evidence at trial barred appellate review. See Hayes, 350 N.C. 79, 511 S.E.2d 302.

The purpose of the contemporaneous objection rule is that it allows the trial court to self-correct any error and avoid the potential for multiple trials. Modern Evidence Doctrine and Practice, §1.3 at 7 (1995). Petitioner argues that when the court has already been made aware of a party's contention that evidence is not admissible by means of a

fully-litigated pre-trial motion, as here, no legitimate purpose is served by again having to object to the same evidence because the court has already been afforded the opportunity to self-correct. See Favala v. Cumberland Engineering Co., 17 F.3d 987, 991 (7th Cir. 1994); Toliver v. Wyrick, 469 F.Supp. 583, 600 (W.D.Mo. 1995) (holding that the contemporaneous objection rule served no legitimate state interest and violated due process where a pre-trial hearing had notified the court that the evidence in question violated the Fourth Amendment).

While the right to appellate review may not be required by the Due Process Clause; see e.g. McKane v. Durston, 153 U.S. 684, 687 (1984); once appellate review is afforded to defendants, the rules that govern appellate procedures must be rational and reasonable so as to comport with due process. Evitts v. Lucey, 469 U.S. 387, 400-02 (1985); Douglas v. California, 372 U.S. 353 (1963). Petitioner contends that barring appellate review of violations of his confrontation rights solely because no contemporaneous objection was made even though admissibility was fully adjudicated prior to trial is not rational and reasonable, and violates due process.

Contrary to Petitioner's argument, North Carolina's contemporaneous objection rule does have a rationale. As recognized by several federal courts, "the rationale for requiring either a renewed objection, or an offer of proof, is to allow the trial judge to reconsider his [prior] *in limine* ruling with the benefit of having been witness to the unfolding events at trial." United States v. Graves, 5 F.3d 1546, 1552 (5th Cir. 1993) (citing Luce v. United States, 469 U.S. 38, 41-42 (1984) ("The ruling is subject to change when the case unfolds...Indeed even if nothing unexpected happens at trial, the district judge is free...to alter a previous

in limine ruling.").[1] This rationale is especially applicable in this case, where the trial judge's ruling left several issues unresolved. For example, in his order denying the motion *in limine*, Judge Saunders noted that he reserved the right to reconsider his rulings. Moreover, the admissibility of all of the hearsay statements was not resolved by the trial court's order denying the motion *in limine*. These unresolved issues regarding some of the hearsay statements necessitated contemporaneous objections at trial.

Most significant to the analysis at hand, however, is the fact that there is no United States Supreme Court precedent invalidating the contemporaneous objection rule under federal due process. Although Petitioner cites Chambers v. Mississippi, 410 U.S. 284 (1973) as providing such precedent, the Supreme Court has never specifically held that the contemporaneous objection rule violates due process under these circumstances. The Chambers Court merely noted that when a state's evidentiary rules are so archaic that they have no rational basis and the working of the rule deprives the petitioner of a fair trial, due process is offended and a new trial is required. Moreover, as noted above, several federal circuits have followed North Carolina's rule that in order to preserve the alleged error for appeal, an objection or offer of proof must be made at trial even after the same issue has been resolved in a prior motion *in limine* hearing. See Graves, 5 F.3d at 1553; McEwen v. City of Norman, 926 F.2d 1539, 1544 (10th Cir. 1991); United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987); Hendrix v. Raybestos-Manhatton Inc., 776 F.2d 1492, 1504 (11th Cir. 1985); United States v. Traylor, 656 F.2d 1326,

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[1] Federal Rule of Evidence 103(a) now disposes of this issue by stating that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

1333 n. 6 (9th Cir. 1981).[2] That several federal circuit courts have followed the North Carolina rule supports the fact that there is no clearly established United States Supreme Court authority prohibiting this rule. See Vick v. Williams, 233 F.3d 213, 222 (4th Cir. 2000) (stating that it would be "judicial myopia of the first order" to ignore the consensus of reasoned opinions of other courts across the country in determining whether a challenged state court ruling is contrary to clearly established United States Supreme Court precedent under § 2254(d)).

Thus, under the deferential standards of 28 U.S.C. § 2254(d), the North Carolina court's decision upholding the contemporaneous objection rule was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States. Summary judgment for the State on this claim is appropriate.

C. Due Process and Allocution:

Petitioner requests that the court vacate his sentence and grant him a new sentencing hearing because the trial judge did not personally address him and inform him of his right to allocution, thereby violating his due process rights. Petitioner cites Green v. U.S., 365 U.S. 301, 304 (1961) as enforcing the right to allocution prior to sentencing. However, Green's claim was predicated on Federal Criminal Rule 32(a) which provided that "before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of aggravation." Green never litigated his lack of an opportunity to address the court as a constitutional deprivation.

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[2] As noted earlier, Federal Rule of Evidence 103(a) now provides that no renewed objection is required.

Moreover, the Fourth Circuit has held that there is no binding federal constitutional requirement that state courts provide criminal defendants with the right of allocution prior to sentencing. Green v. French, 143 F.3d 865, 881-82 (4th Cir. 1998), cert. denied, 525 U.S. 1090 (1999), modified in part on other grounds and affirmed, Williams v. Taylor, 529 U.S. 362 (2000). Because there is no United States Supreme Court precedent requiring state courts to give criminal defendants the right of allocution before sentencing, § 2254(d) requires denial of this claim.

D. Ineffective Assistance of Counsel on Direct Appeal:

Petitioner argues that his counsel was ineffective in failing to raise on direct appeal the issue of their own ineffective assistance in failing to contemporaneously object to the hearsay statements. The issue could have been addressed because the trial record, standing alone, was sufficient to resolve the issue and no evidence outside the record was needed.

Petitioner cannot show under Strickland that counsel's performance was deficient because the North Carolina Court of Appeals did in fact adjudicate the claims regarding the challenged hearsay statements. Since the North Carolina Supreme Court declined discretionary review of the underlying merits of the admissibility of the hearsay statements, the Court of Appeals' ruling on the merits is the final state court adjudication of these claims. Counsel could not have possibly been deficient in failing to raise Petitioner's ineffective assistance claims. This claim must likewise be denied.

For the foregoing reasons,

IT IS THEREFORE ORDERED that the Respondent's Motion for Summary Judgment is hereby GRANTED, and Petitioner's Motion for Summary Judgment is hereby DENIED.

This 2nd day of January, 2002.

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Graham C. Mullen
Chief United States District Judge